In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 564

ALPHONSO NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 29-37) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1963. The petition for a writ of certiorari was filed on October 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether the instructions were adequate.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 9 counts of an 11 count indictment (R. 1-2)[1] charging offenses under the federal narcotic laws. More specifically, counts 1, 3, 5, and 10 charged the sale of heroin without receipt of a written order form in violation of 26 U.S.C. 4705(a), and counts 2, 4, 6, 7, and 11 charged knowing receipt and concealment of illegally imported heroin in violation of 21 U.S.C. 174.[2] Petitioner was sentenced to 7 years' imprisonment on each count, the sentences to run concurrently with each other (R. 2). The court of appeals unanimously affirmed the conviction (Pet. App. 29-37).

The evidence and the pertinent instructions may be summarized as follows:

1. Counts 1-6 dealt with three distinct but related purchases of heroin in April 1961.

On April 5, 1961, Charles Perry, a narcotics addict, after being searched by narcotic agent Cook, was given $380 in marked government currency and went

[1] "R." designates the appendix in the court of appeals now on file with the Clerk of this Court.

[2] Counts 8 and 9 were dismissed on the motion of the government at the close of its case (R. 33).

to the home of one Steve Spaulding to purchase narcotics (R. 6, 18-19, 23). Spaulding testified that, after he received the money from Perry, he telephoned petitioner and told him he wanted "to make up"—*i.e.*, to purchase drugs (R. 8). Spaulding then went to petitioner's home and asked him for "two spoons of stuff" which, to the witness, meant "two fourths of heroin." He gave petitioner $220 of the funds he had received from Perry, and in return, received two glassine packages wrapped in tinfoil. Spaulding then returned home and diluted "the stuff" with milk sugar and "mannitte". He then repackaged it and gave it to Perry who turned it over to agent Cook (counts 1 and 2; R. 6, 8, 18-19).

On April 10, 1961, Perry, this time accompanied by agent Cook, went to Spaulding's apartment to purchase more narcotics. Spaulding was given $300 in marked currency. He called petitioner's house and made arrangements with Dorothy Nichols, whom he knew as petitioner's wife. Spaulding thereafter went to petitioner's home, where, in exchange for $220, he received from Dorothy Nichols two glassine packages containing a white substance. Before he turned these packages over to Perry, Spaulding diluted the powder contained therein as he had done after the April 5th transaction. These packages were also turned over to agent Cook (counts 3 and 4, R. 6, 8-9, 32).[2]

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[2] The events relating to the April 10th transaction were not permitted into evidence until after the trial court had found there was sufficient evidence to show that Dorothy Nichols had there acted as petitioner's agent (R. 14-15, 19-20, 32).

On April 19, 1961, Spaulding received $300 from agent Cook and once again telephoned petitioner and advised him he "wanted to make up." He was admitted to petitioner's home by Dorothy Nichols, to whom he gave $220. While he was waiting for Dorothy to wrap the "stuff," petitioner entered the room and asked Spaulding if he had been followed. Petitioner noted that someone was standing outside the window and decided to postpone the transaction for fear of disclosure. Spaulding then left the premises. He returned a few hours later and obtained the glassine envelopes from petitioner. He was told by petitioner to be careful. After again diluting the powder contained in these envelopes, Spaulding gave the packages to agent Cook (counts 5 and 6; R. 9, 20).

No written order form was presented by Spaulding at any of these transactions (R. 15, 32). The powder given to Cook after each sale was chemically tested and was found to contain heroin (R. 19-20, 23-24, 25-26).

Count 7 charged concealment of heroin on June 27, 1961. The evidence on this count showed that on February 28, 1957, petitioner and Dorothy Nichols rented a safe deposit box in a Chicago bank; that on June 19, 1961, following Dorothy's death, the vault was opened in accord with petitioner's request; that petitioner had not entered the bank vault before that date; and that the vault contained $12,000 in cash, a gun, bullets, and three envelopes containing white powder (R. 12-14, 15). The Narcotic Bureau was

informed of the contents of the vault (R. 13) and, on June 27, 1961, seized the items therein pursuant to a search warrant. Petitioner advised the agents that the money in the vault belonged to him and, as far as he knew, the powder belonged to his wife. Some of the money in the vault ($160) was found to be part of the marked government currency given by Perry to Spaulding and used by Spaulding to purchase narcotics from petitioner on April 5, 1961 (R. 16). The white powder was found to contain heroin (R. 16, 26). Ernest Lloyd Mack, who testified that he had purchased narcotics from petitioner (see *infra*), stated that, to the best of his knowledge, the gun found in the vault was the same one he had given to petitioner in the middle of April 1961 (R. 28).

Counts 10 and 11 related to purchases of narcotics by Mack. Mack was an addict who first testified to the reaction he received from an injection of heroin. He then described a purchase of narcotics made from petitioner on May 12, 1961, with funds provided by agent Cook. According to Mack, he arranged with petitioner over the telephone to buy "two spoons of stuff" and, after a number of delays, he received two glassine envelopes from Dorothy Nichols at a location pre-arranged with petitioner. No order form was given for this purchase. Mack returned home and injected some of the powder in the envelope into his arm. He stated that he had the reaction he always had from an injection of heroin. He gave the balance of the powder to a friend (R. 27-29).

Petitioner testified in his own defense and denied that he had ever sold narcotics to Spaulding or Mack. He claimed that, although he saw Spaulding in his home on April 10, 1961, Spaulding was in the company of Dorothy Nichols and that, when he saw money in Dorothy's hands belonging to Spaulding, he told the latter to leave. Petitioner further stated that he never put anything into the vault and that the only time he saw the gun found therein was when Dorothy had it (R. 33-35).

2. After instructing, *inter alia*, that a defendant is presumed to be innocent, that the government has the burden of proving guilt beyond a reasonable doubt (R. 40-41), and that persons associating in a common criminal scheme are responsible for the acts and statements of their co-partners in furtherance of the criminal object (R. 43-44), the court turned to the particular charges in this case. It informed the jury generally of the nature of the charges in the various counts of the indictment and read the pertinent provisions of the statutes involved. The court then pointed out that petitioner had denied possession of any narcotics and that proof of knowing possession was essential on the concealment counts, and defined possession and control for the jury (R. 48-50). In concluding its instructions the court stated (R. 52-53):

> Let me reiterate, the defendant is presumed to be innocent unless you find beyond a reasonable doubt that the Government has established his guilt as to one or more counts of the indictment.

You know what is charged. In several of the counts, the sale of narcotics is charged. In other counts, possession of narcotics is charged.

I will send the indictment to the jury room with you so you can examine it further, if you like.

ARGUMENT

1. Petitioner challenges the sufficiency of the evidence on the ground that there was no direct proof that the substance he possessed and sold to Spaulding (counts 1-6) or to Mack (counts 10-11) contained heroin or that he concealed the narcotics found in the safety deposit box (count 7). As appears from the facts summarized in the statement, the evidence was, as the court of appeals found, sufficient to support the conviction on all counts. There is, in any event, no occasion for this Court to reexamine the evidence under each count. Since petitioner received concurrent sentences on each of the counts, the sufficiency of the evidence on any one will support his conviction. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1.

As to the Spaulding transactions, there was chemical analysis to show that the envelopes Spaulding gave to Perry and agent Cook contained heroin. Spaulding testified that he obtained the "stuff" from petitioner, diluted it and then transferred it to Perry or agent Cook. The fact that the analysis was made of the material as delivered by Spaulding does not support the argument that the material obtained by Spaulding from petitioner was not shown

to be heroin. It is inconceivable that Spaulding would have paid a substantial sum of money to petitioner simply to receive a harmless powder. As the court of appeals pointed out, "The jury might well have drawn an inference that Spaulding, the defendant and his wife, did not go through these involved and guarded maneuvers in order to deliver some innocuous powder to Spaulding, who would then return to his own basement and add the heroin, which was subsequently found in the chemical analysis" (Pet. App. 36).

2. There is no merit to petitioner's contention that the instructions were faulty in that the trial judge failed to set forth the charges in detail or relate them to the evidence. Essentially petitioner seems to be urging that the trial judge erred in failing to marshal the evidence for the jury. But the evidence was clear and in no way complex. The trial court sufficiently apprised the jury of the elements of the offenses charged, so that it could apply the law to the uncomplicated facts. Although the trial judge in reading the pertinent statutes to the jury did not state the dates of the sales charged in the sales counts, he did list the dates when referring to the corresponding counts charging the receipt of unlawfully imported narcotics (R. 48). Petitioner did not object to the instructions on the sale counts and shows no reason why his failure to object should not preclude him from raising the issue now. See Rule 30, F. R. Crim. P. As for the concealment counts, the court read the relevant statute to the jury, instructed that the evidence had to show knowing

possession, and defined the elements of possession and control.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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